BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the Eastern District of Pennsylvania is reported in 54 F. Supp. 472 and was handed down March 15, 1944.

The opinion of the United States Circuit Court of Appeals for the Third Circuit was handed down on October 4, 1945, and is unreported as yet.

II.

JURISDICTION.

(*a*) The jurisdiction of this Court is invoked under Section 240 (a) of The Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937, 28 U. S. C. A. Section 347.

(*b*) The judgment of the United States Circuit Court of Appeals for the Third Circuit, which petitioners seek to have reviewed, was dated and filed on October 4, 1945.

III.

STATEMENT OF THE CASE.

A sufficiently full statement of the case has been given in the Petition under the heading "Statement of the Matter Involved", and in the interest of brevity is not repeated here.

IV.

SPECIFICATION OF ERRORS.

A statement of the errors intended to be urged has been given in the Petition under the heading "This Court Has Jurisdiction," and in the interest of brevity is not repeated here.

V.

ARGUMENT.

Petitioner's argument would be directed to the following matters:

(1) What is the matter in controversy and the test of its value for jurisdictional purposes?

(2) Defendants are not joint tort-feasors, therefore, the jurisdictional amount must be shown as to each defendant.

(3) Plaintiff has not averred any facts sufficient to show the existence of the jurisdictional amount.

(4) The face of the complaint reveals that plaintiff is not legally entitled to any equitable relief or damages, therefore, the jurisdictional amount is not present.

A.

What is the Matter in Controversy and the Test of its Value for Jurisdictional Purposes?

The Circuit Court of Appeals took the position that the plaintiff's right to occupy and enjoy its property and to function as a business organization and the protection of that right is the matter in controversy, the amount of which plaintiff, in the first paragraph of the bill of complaint, alleges exceeds $3,000.

Petitioners submit that the Circuit Court of Appeals was in error in this respect, having regard to the averments of the bill of complaint.

Generally, the plaintiff avers that the alleged discharge or deposit of mine wastes by defendants into the Schuylkill River and its tributary streams (either directly or by erosion) has so raised the bed of the River and so narrowed its channel that its value for navigation is being destroyed and the River overflows its banks whenever there is any appreciable increase in the quantity of water through rains or otherwise (Paragraphs 7, 8, 9, 10,

12, 14); and that the discharge or deposit of mine wastes in such manner is a nuisance affecting in various ways and to various degrees all communities and their residents along the River (Paragraph 14).

The Circuit Court agreed with the petitioners that the nuisance referred to by the plaintiff would be a public nuisance under the law of Pennsylvania, particularly as it involves an impairment of the navigability of a navigable stream.

As will be demonstrated later, plaintiff, under the law of Pennsylvania, has a standing to enjoin such a public nuisance only if it can show that it has suffered injury therefrom different in kind and in degree from that suffered by other riparian owners and members of general public coming into contact with the nuisance.

Accordingly, petitioners submit that the test of the value of the matter in controversy must be limited to the actual damages, if any, suffered by plaintiff that differ in kind and degree from that suffered by other riparian owners and members of the general public.

In McNutt, Governor of Indiana v. General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 183 (1936), suit was brought to enjoin the enforcement of the Indiana Retail Installment Sales Act. The complaint contained various allegations relative to the size of plaintiff's business in Indiana but failed to set forth any facts showing the extent of loss of business which might result from regulation. The Supreme Court reversed the decree of the lower Court granting the injunction with directions to dismiss the complaint for want of jurisdiction. In so doing Mr. Chief Justice Hughes pointed out, at page 181:

> "Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322; *Bitterman* v. *Louisville & Nashville R. Co.*, 207 U. S. 205; *Berry-*

man v. *Whitman College*, 222 U. S. 334; *Glenwood Light Co.* v. *Mutual Light Co.*, 239 U. S. 121; *Healy* v. *Ratta*, 292 U. S. 263. But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. * * *"

*

The Circuit Court of Appeals took the position that the value of the rights to be protected provides the test for jurisdictional amount, irrespective of the damage alleged to have been suffered by plaintiff as a result of the alleged actions of the respective defendants. However, there is no averment in the complaint that the plaintiff has been unable to transact its business because of the alleged nuisance. On the contrary, plaintiff avers that it is unable to receive building materials by means of boats or barges on the River and that its business is occasionally interrupted by flood waters (Paragraphs 5, 12).

In Paragraph 10 of the complaint, plaintiff avers that the alleged nuisance is destroying the value of the plaintiff's property for the receipt and discharge of building materials by boats or barges. Accordingly, it is clear that the plaintiff is able to obtain building materials either by the railroad, which runs adjacent to its property, or by truck. Hence, as this Court pointed out in the McNutt case, *supra*, the value of the amount in controversy must be measured by the loss, if any, resulting from the exist-

ence of the alleged nuisance. This would be true, even if the Circuit Court of Appeals is correct in its position as to the matter in controversy.

The following cases of this Court also support petitioner's argument as to the matter in controversy and the test of its value: Kvos, Inc. v. Associated Press, 299 U. S. 269, 56 S. Ct. 197 (1936); Gibbs, Attorney General, et al. v. Buck, 307 U. S. 66, 59 S. Ct. 725 (1939). See also Leitch v. City of Chicago, et al. (C. C. A. 7th, 1930), 41 F. (2d) 728, certiorari denied, 282 U. S. 891, 51 S. Ct. 106 (1930).

B.

Defendants Are Not Joint Tort-Feasors; Therefore The Jurisdictional Amount Must Be Shown As To Each Defendant.

The Circuit Court of Appeals conceded that the Pennsylvania law, controlling on the substantive matters involved in the present controversy, holds that the liability of the defendants is several and not joint. However, that Court refused to hold that the plaintiff was required to show the existence of the jurisdictional amount with respect to each defendant. Instead, that Court held that the damage allegations of the bill were merely a collateral item to the injunctive feature of the litigation. In this respect, we believe that the Circuit Court of Appeals was in error.

While Rule 20 has liberalized the joinder of claims and parties, it has not altered the substantive rights of the litigants. The Act (48 Stat. 1064, 28 U. S. C. A. §723b, §723c) under which the new rules were promulgated expressly provides:

> "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Accordingly, where two or more defendants are joined by the same plaintiff in one suit, the pecuniary test of

jurisdiction still is ordinarily founded on the joint or several character of their liability. If the liability is several, the respective claims cannot be aggregated for jurisdictional purposes but must be pleaded separately with respect to each defendant. CHAMBERLAIN v. BROWNING, 177 U. S. 605, 20 S. Ct. 820 (1900); EX PARTE PHOENIX INSURANCE COMPANY, 117 U. S. 367, 6 S. Ct. 772 (1886); CLARK, DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES v. PAUL GRAY, INC., ET AL., 306 U. S. 583 (1939). See also 1 Moore's Fed. Practice, 542, 543.

In the present case, the plaintiff has seen fit to join in one action separate actions at law for damages against sixteen defendants whose liability is several, together with an equitable action against such defendants. Plaintiff in its complaint has aggregated its claims against the various defendants for the purpose of showing the jurisdictional amount.

The complaint contains no allegation whatsoever that the amount involved as to any one or more of the defendants individually exceeds the jurisdictional amount of three thousand dollars ($3,000). On the contrary, in Paragraph 11 of the complaint, it is averred that the mine wastes alleged to have been discharged by the defendants into the River "are so united, combined and intermingled within the River" as to be impossible of tracing to any individual defendant, and that "the injury and damage to the plaintiff is brought about by the united and combined acts of the defendants". In Paragraph 1, the complaint merely sets forth the formal allegation that the amount in controversy exceeds the sum of three thousand dollars ($3,000).

The Circuit Court of Appeals was clearly in error in holding that the legal actions for damages were incidental to the equitable relief sought by the plaintiff. In order to bring the action against the respective defendants for damages, without seeking equitable relief as well, it would have been necessary for the plaintiff to show the

existence of the jurisdictional amount with respect to each defendant. The mere fact that the plaintiff saw fit to combine legal actions with the equitable action does not change the situation.

It is true, as pointed out by the Circuit Court of Appeals, that in Paragraph 3 of the prayer for relief the plaintiff prays that "the amount of damage" sustained by it through the alleged acts of the defendants be ascertained and assessed against the defendants in proportion to their contribution to the injury and damage. However, this falls far short of pleading the jurisdictional amount with respect to each defendant.

As a matter of fact, the plaintiff in its Brief filed with the Circuit Court of Appeals (p. 14) admitted that the averment of jurisdictional amount does not indicate that the plaintiff has a claim for monetary damages in excess of three thousand dollars ($3,000) against each individual defendant.

Accordingly, the Circuit Court of Appeals was in error in holding that the plaintiff was not obligated to show the jurisdictional amount with respect to each defendant insofar as the averments for monetary damages are concerned.

C.

Plaintiff Has Not Averred Any Facts Sufficient to Show the Jurisdictional Amount.

The only averment in the complaint relative to the jurisdictional amount is a simple averment that "the amount in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000)." Nowhere in the complaint is there any other allegation relating to the value of the right alleged to be invaded or to the amount involved as to each individual defendant. Likewise, there are no facts averred in the complaint from which these matters may be inferred. This is true

irrespective of what view is taken as to the matter in controversy. Under the decisions of this Court, this in itself is a fatal defect in the complaint, insofar as the jurisdictional amount is concerned.

Strangely enough, the Circuit Court of Appeals avoided all mention of this subject in its opinion, notwithstanding that this point was argued at length before the Court, and notwithstanding that there are no facts averred in the complaint showing the value of the right held by the Court to be the matter in controversy. Clearly that court was in error in that respect even on its own theory of the case.

In CLARK, DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES v. PAUL GRAY, INC., ET AL., 306 U. S. 583, 59 S. Ct. 744, 83 L. Ed. 1001 (1939), which involved a suit by various plaintiffs against certain state officials to enjoin the enforcement of the California Caravan Act of 1937 and where license fees payable by each plaintiff except one did not exceed the jurisdictional amount, Mr. Justice Stone, in reversing the lower Court on the ground that the jurisdictional amount did not appear, stated, at pages 588, 589:

> "* * * The bill of complaint alleges generally that 'the amount involved in this litigation is in excess of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.' But it is plain that this allegation is insufficient to satisfy jurisdictional requirements where there are numerous plaintiffs having no joint or common interest or title in the subject matter of the suit. * * *
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> "* * * The general allegation in the bill of complaint that 'the amount involved in this litigation is in excess of' $3,000 and the finding of the court that 'the amount involved in the within action' exceeds the jurisdictional amount, give no indication that the amount in controversy with respect to the

claim of any single plaintiff exceeds the jurisdictional amount and are insufficient to show that the district court had jurisdiction of the cause. *Pinel* v. *Pinel, supra.*"

In McNutt, Governor of Indiana v. General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 183 (1936), the General Motors Acceptance Corporation of Indiana sought to enjoin an Act regulating but not prohibiting the business of the corporation. The complaint contained various allegations relative to the size of the plaintiff's business in Indiana but failed to set forth any facts showing the extent of loss of business which might result from the regulatory Act. The Supreme Court reversed the decree of the lower Court granting the injunction with directions to dismiss the complaint for want of jurisdiction. In so doing, Mr. Chief Justice Hughes pointed out, at page 181:

"* * * The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

Mr. Chief Justice Hughes then pointed out that the burden was upon the plaintiff to make the necessary

allegations showing jurisdiction. In this connection he pointed out, at page 189:

> "* * * The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. *He must allege in his pleadings the facts essential to show jurisdiction.* If he fails to make the necessary allegations he has no standing." (Italics ours.)

The bill of complaint reveals that plaintiff's alleged special injury, using plaintiff's own words, is in the form of "large and irreparable damages through the permanent depreciation of the value of its property and through the curtailment of the lawful uses to which such property might be put by the plaintiff" (Paragraph 16) because plaintiff is unable to obtain building materials by means of boats and because of the occasional overflow of the river (Paragraphs 5 and 10).

There is nothing in such general averments from which this Court could even reasonably infer the amount of injury alleged to have been suffered by the plaintiff by the action of each of the defendants. This Court in the cases cited above has clearly indicated that such general and indefinite averments are insufficient to meet the burden upon the plaintiff to show the jurisdictional amount.

Nowhere in the complaint does the plaintiff point out the date it acquired its property; whether the condition of the Schuylkill River adjacent to plaintiff's property in any wise changed between the date plaintiff acquired its property and the date of the filing of this complaint; whether at the time of acquisition of the property boats or barges were able to be used for the receipt or discharge of building materials at plaintiff's

piers and docks and, if so, the time when boats and barges could no longer be used for such purposes; whether at and since the time of acquisition of the property the piers and docks were or are in a useable condition; the period of time, if any, plaintiff utilized boats and barges for the above purposes and the difference in cost, if any, in now obtaining or making delivery of building materials by railroad or truck instead of by barges or boats; whether the property was subject to flood waters at the time of its acquisition or whether this is a new development; the manner and extent to which plaintiff's property is damaged and his business is disrupted by the alleged periodical floodings; and the nature and scope of the alleged depreciation in the value of the property alleged to have resulted from the actions of the respective defendants.

In the absence of any averments on the matters indicated above, the bill of complaint, on its face, fails to indicate any basis from which the Court could intelligently determine whether or not the jurisdictional amount is involved in the present controversy.

The insufficiency of plaintiff's bill of complaint to show that the jurisdictional amount is involved is aptly illustrated in LEITCH v. CITY OF CHICAGO ET AL. (C. C. A. 7th, 1930), 41 F. (2d) 728 (Certiorari denied 282 U. S. 891, 51 S. Ct. 106, 75 L. Ed. 786 (1930)). That case involved a suit to prevent the defendants from filling up a navigable stream on which plaintiff's land bordered. The bill contained a mere allegation by the plaintiff that his property was worth many times the jurisdictional amount of $3,000. The Circuit Court of Appeals sustained the decree of the District Court denying plaintiff's motion for a preliminary injunction and directed that the bill be dismissed for want of jurisdiction. In so doing the Court stated, at page 730:

> "* * * In appellants' motion for preliminary injunction it was stated that the land is worth many

times the jurisdictional amount of $3,000. This may well be true, and yet the value of the riparian rights, or the damage to the land by reason of filling up the stream, may be very little. Because of allegations in the bill that one time some boats ran on this water, and that railroads, stockyards, and factories are in the vicinity of the plaintiff's land, we cannot judicially assume that plaintiff's damage through the filling would be in excess of $3,000, nor indeed that the land will be damaged at all. From such allegations it cannot be assumed that the amount in controversy exceeds $3,000, any more than it may be concluded from statements of the opposing parties that this little stream, popularly known as "Bubbly Creek,' is a distinct detriment to the property abutting upon it, which would be greatly enhanced in value if the stream were filled."

D.

Face of Complaint Reveals that Plaintiff is not Legally Entitled to any Equitable Relief or Damages; Therefore Jurisdictional Amount is not Present.

In SAINT PAUL MERCURY INDEMNITY CO. v. RED CAB COMPANY, 303 U. S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938), this Court had occasion to outline the law relating to the jurisdictional amount in cases of original jurisdiction and in removed cases. On the former point, Mr. Justice ROBERTS stated at pages 288-289:

> "* * * But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. * * *"

An examination of the bill of complaint reveals to a legal certainty that plaintiff is not entitled to the equitable relief or monetary damages prayed for in the complaint. This is true for two reasons: (1) Plaintiff is seeking to enjoin an alleged public nuisance without showing that it has sustained special injury different in kind and degree from that suffered by members of the general public coming into contact with the nuisance; and (2) Plaintiff has failed to state a cause of action having regard to the law of Pennsylvania pertaining to the mining industry and the discharge of wastes from that industry into rivers and streams. Under these circumstances, there is no matter in controversy which has a value in excess of the jurisdictional sum.

(1) Plaintiff Is Seeking To Enjoin An Alleged Public Nuisance Without Showing Injury Peculiar To Itself.

The Circuit Court of Appeals conceded that the plaintiff had pleaded a public nuisance and that under the Pennsylvania law plaintiff had no standing to enjoin the same in the absence of any showing that plaintiff had suffered an injury different in kind and degree from that suffered by the general public coming into contact with the nuisance. The Circuit Court of Appeals held that plaintiff had made such a showing of special injury. However, petitioners submit that plaintiff has not made such a showing in view of the Pennsylvania decisions on the subject.

Plaintiff, in an apparent attempt to show special injury unto itself, avers that the culm deposits in the bed of the River adjacent to its property prevent boats being brought close enough thereto to enable materials used in plaintiff's business to be unloaded at its pier, and that as a result of storms the occasional overflow of the River at and along plaintiff's property results in great damage to such property and greatly disrupts plaintiff's business

(Paragraphs 5, 10, 12). However, the bill of complaint expressly avers that the waste materials are carried by the River through its entire length and affect in various ways and to various degrees all communities and their residents along the River (Paragraph 14). Clearly the type of injury alleged to be suffered by the plaintiff differs from that alleged to be suffered by other riparian owners only as to degree. Certainly it does not represent an injury dierent in kind from that alleged to be suffered by other coming into contact with the River. In other words, the plaintiff and all other persons or corporations along the River are similarly affected by the condition of the River resulting from the accumulated deposits of mine wastes and the respective injuries from this source undoubtedly vary only as to degree.

Even if the plaintiff was completely dependent upon the Schuylkill River to obtain building materials necessary for its business (which is not the case), plaintiff would not be entitled to maintain this action in its private capacity. This is clearly illustrated by the following case.

In THE BUCK MOUNTAIN COAL COMPANY v. THE LEHIGH COAL AND NAVIGATION COMPANY, 50 Pa. 91 (1865), the plaintiff filed a bill against the Lehigh Coal and Navigation Company to restrain it from neglecting to repair and put in operation its slack water navigation system which had been swept away by a flood on June 4, 1862. The plaintiff *was entirely dependent* upon the slack navigation system in order to get its coal to the market and alleged that it had suffered a loss of more than $50,000 as a result of the failure of Lehigh to restore its navigation system for a period of more than seven months after the flood. The plaintiff had constructed a railroad from its coal lands to its tract of land adjoining the navigable system which was also rendered useless. The lower Court dismissed the bill on the ground that the legislation pertaining to the navigation system prescribed a statutory remedy. On appeal the Supreme Court affirmed the dis-

missal of the bill but on the ground that the plaintiff, a private party, had no standing to abate a public nuisance, Mr. Justice Thompson stated, at page 99:

> "It seems to us they are not the proper parties to enforce this duty on part of the company to the public, in the absence of any *special injury* to themselves or property; and by this we mean, any injury, special in its operation, resulting from a failure to perform some specified duty to them, or to make compensation for injury and deterioration to their property, as contradistinguished from injury to them in common with the whole public, in the loss of a convenient and valuable highway.
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> "There are many authorities in England and in this country which deny the right of private parties in their own names—in the absence of special laws—when their interests are only in common with the public, to compel the performance of a duty to the public. The reason is, that if one individual may interpose, any other may, and as the decision is one individual case would be no bar to any other, there would be no end to litigation and strife. The general laws of order so necessary to good government forbid anything like this."

Clearly, if the plaintiff in the above case was not entitled to maintain an action in its private capacity, the plaintiff in the present case has no better standing.

In Gold v. The City of Philadelphia, 115 Pa. 184 (1886), plaintiff instituted an action against the city to recover damages alleged to have been sustained by her by reason of the falling off in patronage at her inn through the negligence of the city in not repairing and keeping in passable condition the highway upon which it was situated. The evidence clearly showed that the city had been guilty of negligence in this respect. A judgment was entered in favor of the defendant in the

lower Court and this was affirmed by the Supreme Court. In so doing the Mr. Justice Paxson stated, at page 197:

> "The learned referee ruled this case upon the familiar and well settled principle, that one who is injured by a public nuisance, either in his person or in his property, cannot have his remedy by action, unless he can show a damage which is peculiar to himself, and different in kind and degree from and beyond that which is sustained by the general public.
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> "The plaintiff contends that the referee erred in his application of this principle to the facts of her case. We do not think so. *The injury was one common to all persons who traveled on the road and who resided thereon.* The annoyance and inconvenience to some may have been much greater than to others, but it was of the same kind and differed only in degree." (Italics ours.)

In RHYMER v. FRETZ, 206 Pa. 230 (1903), the plaintiff sought to enjoin the defendant from enlarging a frame building across the street on the ground that the frame structure and the uses (gospel mission and saw mill) to which it was being put would endanger property in the vicinity from fire, and together with the gathering of disreputable persons in the neighborhood, would deprive the plaintiff and his neighbors from the full enjoyment of their property and home. The Court below granted the injunction. On appeal the Supreme Court reversed the lower Court's decision. In so doing, Mr. Justice Mestrezat stated, at page 233:

> "* * * In this averment there is no allegation that by the construction and use of the building the plaintiff will sustain any damage special to himself, or that his property will be subjected to any other or greater danger than that of his neighbor. The danger from fire and the deprivation of the enjoyment and use of property are, therefore, as alleged

in the bill, common to all the property and persons residing in the vicinity of the proposed structure. The anticipated injury or damage to the property of the plaintiff by the erection of the building will be the same in character and degree as that which will result to the property of every other person in the neighborhood. * * *"

The Circuit Court of Appeals took the position that the case of KNOWLES v. PENNSYLVANIA RAILROAD COMPANY, 175 Pa. 623 (1896), represents the present Pennsylvania law on this subject. However, petitioners point out that in that case the plaintiff was able to show an injury different in kind and degree from that suffered by other persons coming into contact with the alleged nuisance.

In the present case the annoyance and inconvenience of defendants' alleged actions to some members of the public may be much greater than to others, but it is of the same kind and differs only in degree. The plaintiff and all riparian owners and the general public are allegedly precluded from enjoying or benefiting from the navigation of the River. This is equally true at low water or during flood waters. Also, flood waters affect the riparian owners and the general public in various degrees but the annoyance and inconvenience is of the same kind and stems from the same source.

(2) PLAINTIFF HAS FAILED TO SHOW A CAUSE OF ACTION WHICH WOULD ENTITLE IT TO EQUITABLE RELIEF OR MONETARY DAMAGES.

Having regard to the decisional and statutory law of Pennsylvania relative to the mining industry, it is apparent to a legal certainty from the face of the bill of complaint that plaintiff would not be entitled to the equitable relief or the monetary damages sought in its prayer for relief.

By its decision in the leading case of THE PENNSYLVANIA COAL COMPANY v. SANDERSON, 113 Pa. 126, 6 Atl. 453 (1886) (three Justices dissenting), the Supreme Court

of Pennsylvania has limited the application of the maxim, *sic utere tuo ut alienum non laedos,* which is generally observed, in favor of the proposition that harm caused to one land owner by another as the necessary and unavoidable result of a natural use of his land by the latter, without negligence or malice, is *damnum absque injuria.*

The Supreme Court of Pennsylvania in denying plaintiff relief stated, at page 146:

> "The defendants, being the owners of the land, had a right to mine the coal. It may be stated, as a general proposition, that every man has the right to the natural use and enjoyment of his own property, and if whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria,* for the rightful use of one's own land may cause damage to another, without any legal wrong.
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> "Mining in the ordinary and usual form is the natural user of coal lands; they are, for the most part, unfit for any other use. 'It is established,' says Cotton, *L. J.,* in West Cumberland Iron Co. *v.* Kenyon, 11 L. R., 6 Ch. Div., 773, 'that taking out mineral is a natural use of mining property, and that careful, proper mining operations.' In the same case Brett, *L. J.,* says: 'The cases have decided that where that maxim *(sic utere tuo ut alienum non loedas)* is applied to landed property, it is subject to a certain modification; it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.' L. R., 11 Ch. Div., 787.
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> "The right to mine coal is not a nuisance in itself: It is, as we have said, a right incident to the ownership of coal property, and when exercised in the ordinary manner, and with due care the owner cannot be held for permitting the natural flow of

mine water over his own land, into the water course, by means of which the natural drainage of the country is effected."

In subsequent decisions, it was held that persons engaged in the mining industry are required to use known appliances and methods to prevent as far as possible the discharge of mine waste into the streams. See HARVEY v. SUSQUEHANNA COAL COMPANY, 201 Pa. 63 (1902); ELDER v. LEICHENS COAL COMPANY, 157 Pa. 490 (1893).

Accordingly, under the law of Pennsylvania, the defendants in carrying on their business of mining are under the duty to use the most effective and approved known methods of appliances to minimize the discharge of mine wastes into the River or its tributaries; and if some of the mine wastes escape into the River with injurious results despite such precautionary measures, no lack of care can be imputed to the defendants and any damages resulting therefrom are *damnum absque injuria*.

There is legislative recognition that some amount of mine wastes will still escape into the nearby streams notwithstanding presently known methods of prevention.

The Act of June 22, 1937, P. L. 1987, 35 P. S. Sec. 69.1 *et seq.* relates generally to the pollution of waters of the Commonwealth. Article III of the Act relates to pollution by industrial wastes and generally prohibits the discharge of industrial wastes into the waters of the Commonwealth. Section 310, P. S. Sec. 691.310, provides as follows:

> "* * * The provisions of this article shall not apply to acid mine drainage and silt from coal mines until such time as, in the opinion of the Sanitary Water Board, practical means for the removal of the polluting properties of such drainage shall become known."

Plaintiff, in its prayer for relief, seeks to have the defendants (*a*) perpetually enjoined from discharging any mine wastes whatsoever into the Schuylkill River or its

tributary streams or upon any land adjacent thereto where the waste materials can or may be washed into the River or its tributaries and (*b*) required to take adequate measures and precautions to prevent erosion or escape into the Schuylkill River or its tributary streams of existing deposits of mine wastes.

This, as we have shown, raises too high a standard of care on the part of the defendants under the Pennsylvania law. If defendants were to be enjoined from doing anything which might result in any mine wastes *whatsoever* ultimately entering the River or its tributaries, they would have to cease doing business until some means or methods became known whereby no particle of mine waste could possibly enter the River or its tributaries. This would result in defendants being deprived entirely of the natural use of their lands which would be contrary to Pennsylvania law.

Moreover, the equitable relief sought with respect to the past and future deposits of mine wastes upon land adjacent to the River raises too high a standard of care. Under the Elder case, *supra*, the defendants may deposit culm and refuse from their mines on their own lands where such deposits will be safe from encroachment by ordinary floods. If an extraordinary flood should reach and carry away any portion of such deposits, there would be no liability for damages sustained by any lower riparian owners. However, the injunctive relief sought would require defendants to take precautionary measures to prevent any erosions of such deposits under any circumstances. Also, there is no showing by plaintiff that there are known practicable means whereby this can be done.

Accordingly, it is clear to a legal certainty that plaintiff is not entitled to the broad equitable relief set forth in its prayer.

Likewise, plaintiff is not entitled to the monetary damages prayed for in its bill of complaint.

Under the law of Pennsylvania, as we have shown above, mining coal and discharging and depositing the

mine wastes incident thereto is not *per se* willful, negligent, wanton, reckless or unlawful. Such mining, discharge and deposit becomes unlawful only if conducted without taking those methods which could be taken or used to prevent or minimize damage to others.

Plaintiff, in its bill of complaint, avers in very general terms that the defendants are utilizing various systems of cleaning coal whereby mine wastes are willfully, negligently, wantonly, reckless and unlawfully discharged into the Schuylkill River or its tributary streams (Paragraph 7); and that defendants in the course of their past operations have accumulated large deposits of mine wastes on their lands adjacent to the River and its tributaries which they have negligently, recklessly, willfully and wantonly failed to properly secure, enclose, hold or otherwise stabilize to prevent erosion into the River and its tributaries (Paragraph 9).

Having regard to the decisional and statutory law of Pennsylvania relating to the mining industry, it is at once apparent that the plaintiff by the above generalizations has failed completely to state any ultimate facts whatsoever from which this Court could properly reach the conclusion that the defendants have been or are guilty of a condition which can properly be described as willfull, negligent, reckless, wanton and unlawful.

In the absence of the specification of the respects in which it is claimed that each of the several defendants have failed to adopt available measures to minimize the effect of their operations on subjacent properties, the plaintiff has not made out a cause of action.

What we have said above applies equally to the deposits of mine wastes which plaintiff, in Paragraph 9 of its complaint, avers have accumulated upon the lands of the defendants "in the course of their past operations."

In the absence of the ultimate facts referred to above, plaintiff's complaint in substance amounts to nothing more than an imputation of negligence, etc. against the defendants merely because some mine wastes ultimately

find their way into the Schuylkill River and its tributaries. This, as we have shown, raises too high a standard of care on the part of the defendants under the Pennsylvania law.

Plaintiff's complaint contains no averment that the mine wastes have been deposited on its property with resulting damage. It is true that in Paragraph 10 it is stated that the mine wastes have been and are being carried down the stream by the flow of the river "to and upon the premises of the plaintiff"; however, there is nothing in the complaint to indicate just what the plaintiff means by the term "upon the premises".

It would appear that plaintiff is referring to the bed of the stream adjacent to its property because plaintiff states in Paragraph 10 that the mine wastes are destroying the value of the river for navigation and "the value of plaintiff's property for the receipt and discharge of building materials transported by boats or barges".

Accordingly, plaintiff has not stated a cause of action in this respect, particularly so as the title to the bed of the stream adjacent to plaintiff's property is in the Commonwealth of Pennsylvania. PHILADELPHIA v. PHILADELPHIA SUBURBAN WATER CO., 309 Pa. 130 (1932).

In view of the fact that it is clear from the face of the complaint that plaintiff would not be entitled to either the equitable relief or the monetary damages it seeks, there can be no jurisdictional amount involved in the present case.

Therefore it is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that a Writ of Certiorari should be issued.

Respectfully submitted,

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